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No. 06-637

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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F. on behalf of GILBERT F., a minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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The language of 20 U.S.C. § 1412(a)(10)(C)(ii) is clear and establishes that parents may request private school tuition reimbursement under the IDEA only where their child has "previously received special education and related services under the authority of a public agency." One purpose of this provision, as with many provisions of the IDEA, is to promote cooperation between parents and school districts in the education of students with disabilities. Congress intended that parents and school districts work together to resolve disagreements about the services being provided to children with disabilities, and subsection (C)(ii) states clearly one of the ways that Congress effectuated that intention.

Respondent and his *amici* attempt to avoid the plain language of the statute by misrepresenting the purpose and structure of the IDEA, as well as this Court's decision in *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985). *Burlington* established that a remedy of private school tuition reimbursement was available under the IDEA's predecessor statute, but it did not address the issue presented in this case, *i.e.*, whether hearing officers and courts may order such reimbursement where the child has never received special education and related services from the public agency. With the 1997 amendments, Congress answered that question, and respondent's strained attempts to avoid what the statute says are unavailing.

Finally, even if respondent were correct that the statute does not prevent parents from seeking reimbursement where the child has not previously received special education and related services from the public entity, the statute certainly does not provide clear notice that states are obligated to provide such reimbursement in cases where the student has not previously received such services from the public agency. Spending Clause legislation like the IDEA must provide clear notice of the obligations it imposes, and without that notice, such obligations cannot be enforced against the States.

POINT I

THE LANGUAGE OF SECTION 1412(a)(10)(C)(ii) OF THE IDEA IS CLEAR AND CREATES A STATUTORY THRESHOLD TO TUITION REIMBURSEMENT

The language chosen by Congress means what it says:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The plain meaning of this language is that courts and hearing officers may order reimbursement of private school tuition only if the student "previously received special education and related services" from the school district. It creates a threshold requirement that must exist before parents may ask a hearing officer or a court to order reimbursement for private school tuition pursuant to the IDEA. This interpretation is a straightforward reading of the statutory language, and it should be adopted by this Court.

This interpretation also flows naturally from a reading of the statutory section of which this clause is part. The provision at issue—clause (ii) of subsection (C)—is part of a subsection entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Subsection (C)(ii) sets forth the authority of hearing officers or courts to order tuition reimbursement, and it says that they may do so where the child has previously received special education and related services

from the school district. The statute then sets forth factors hearing officers and courts should consider in determining whether "the reimbursement described in clause (ii)" should be reduced or denied. 20 U.S.C. § 1412(a)(10)(C)(iii). For example, as will be discussed in greater detail, *infra*, a parent is required to give ten business days notice to the public agency prior to removing the child from the public school. Thus, the statute makes quite plain that the reimbursement hearing officers or courts may order is the reimbursement specified in subsection (C)(ii), and the language of subsection (C)(ii) states plainly that that reimbursement is available for students "who previously received special education and related services" from the school district.

The language in subsection (C)(ii), therefore, establishes a condition precedent to a parent's request for tuition reimbursement. The language of the statute means that parents who unilaterally place their child in a private school may not request tuition reimbursement—and a hearing officer or court cannot consider granting tuition reimbursement—unless the child has previously received special education and related services under the authority of a public agency. Petitioner respectfully submits that the "previously received" language is clear and that it creates a statutory threshold to tuition reimbursement.

POINT II

SUBSECTION (C)(ii) IS CONSISTENT WITH THE IDEA'S EMPHASIS ON COOPERATION BETWEEN PARENTS AND SCHOOL OFFICIALS

A straightforward reading of the statutory language is also consistent with the purpose and structure of the IDEA. Congress intended to promote cooperation between the parent and the school district, and it intended that if a parent genuinely wants to avail the child of a free appropriate public education, the public school must be afforded the opportunity to work with

the parent. Subsection (C)(ii) demonstrates Congress's intent that the parent cooperate with the school district in a meaningful way, as well as Congress's recognition that the only way to foster cooperation is for the student to participate, even if for only a short while, in the public education process.

In trying to circumvent the plain language of the statute, respondent is forced to misconstrue the purpose of the IDEA. Respondent seems to be of the view, as the Solicitor General asserts, that "the Act requires States to provide [FAPE]" to "all children residing in the State," subject to just two enumerated exceptions not at issue here. Brief for the United States as Amicus Curiae Supporting Respondent at pp. 1-2, 7, 20. Respondent and his *amici* then claim, incorrectly, that the consequence of following the statutory language would be to leave parents of students who have not previously received special education and related services from the school district with no remedy if the school district's IEP does not provide FAPE. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at p. 20.[1]

The purpose of the IDEA is to provide children with disabilities with access to a free appropriate public education. 20 U.S.C. § 1400(c)(3). The IDEA, however, does not require states to provide a FAPE to every child. Where parents voluntarily place a child in private school, they are not entitled

1. In support of this argument, the Solicitor General misconstrues the purpose of the "child find" requirement contained in 20 U.S.C. § 1412(a)(3) and (a)(10)(A)(ii). The Solicitor General contends that the child find requirement is meant "to ensure that the State *makes available* to [all disabled children] a free appropriate public education" (emphasis in original). Brief for the United States as Amicus Curiae Supporting Respondent at p. 22. As § 1412(a)(10)(A)(ii)(II) makes clear, however, in regard to children voluntarily placed in private schools by their parents, the child find requirement is meant "to ensure equitable participation of parentally placed private school children with disabilities. . . ." Under the IDEA, States need not provide parentally placed private school children with a FAPE. *See* 20 U.S.C. § 1412(a)(10)(A).

to a FAPE at public expense. Instead, the IDEA requires a state to provide only certain defined services, and then only the amount of those services that can be paid for with each child's proportionate share of funds under the IDEA. 20 U.S.C. § 1412(a)(10)(A).

Thus, the IDEA creates a distinction between students in private schools and students who are in public school or receive services under the authority of a public agency. Consistent with that distinction—and with the different obligations a state has in regard to children in those distinct situations—the IDEA places limits on the ability of parents to request private school tuition reimbursement, even where a court or hearing officer finds that the school district did not offer a student a FAPE. For instance, under 20 U.S.C. § 1412(a)(10)(C)(iii), tuition reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended "prior to removal of the child from the public school," the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense[2]; or if within "10 business days . . . prior to the removal of the child from the public school," the parents did not give written notice to the public agency.[3]

These limitations presume that the child was receiving services from the public school and that the child is being removed from the public school placement to be placed unilaterally in private school. Seen in the context of the statute, then, the "previously received" language makes perfect sense. It means that parents may request tuition reimbursement only for those students who have received special education and related services under the authority of the public agency. This

2. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

3. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb).

limitation, like the factors contained in § 1412(a)(10)(C)(iii), is meant to foster cooperation between parents and school districts.

Respondent's interpretation of the statute, on the other hand, is inconsistent with the IDEA's structure and would undermine the cooperation the IDEA is intended to foster. If, as respondent contends, students need not ever have received special education and related services from the public entity before requesting private school tuition reimbursement, then not only is the "previously received" language rendered meaningless, but the ten day notice requirement is rendered entirely ineffective, since there can be no notice "prior to removal of the child from the public school" if the child never received any services from the public school.

Indeed, respondent's interpretation would create a perverse incentive for parents to avoid ever trying to work out an appropriate placement with the school district. Under respondent's interpretation, parents whose child participates in the public placement would be required to provide written notice of their intent to reject it ten days prior to removing the child from the public placement. If, however, the student never participated in the public placement, then the parents would not have to provide such notice. Thus, respondent's interpretation would make it less likely that parents would cooperate with school districts. This result would run counter to Congress's intent to foster more, rather than less, cooperation between parents and school districts.[4]

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4. In fact, one result of respondent's argument would be that parents who place their children in private school without cooperating with the public school would have an advantage in getting tuition reimbursement over parents who cooperate with the public school, because the limiting factors of 20 U.S.C. § 1412(a)(10)(c)(iii) would not be applicable to a tuition reimbursement claim if the student has not previously received special education and related services from the public agency.

(Cont'd)

Respondent's argument also relies upon the faulty premise that the IEP, once developed, is a static document that cannot be changed. Respondent seems to be arguing that if an IEP is not adequate, a parent's only remedy is to remove a child unilaterally to private school and seek tuition reimbursement. Respondent is incorrect. The ten day notice requirement, for instance, makes parents identify their complaints about the IEP and gives the school district the opportunity to address those complaints. Thus, cooperative resolution of a parent's complaints is one possible remedy. Impartial hearings are another. If an IEP does not provide a FAPE, parents may seek an impartial hearing for the purpose of obtaining an order for the school district to provide the services the student requires. 20 U.S.C. § 1415(f). If such an order is obtained, the school district must provide the ordered services.[5]

Respondent and his *amici* thus misconstrue the IDEA and its requirements in order to try to support their strained interpretation of the statute's words. There is a reason they must do so: the language of the statute is plain, and it is an integral piece of the IDEA's statutory framework.

(Cont'd)

For instance, if a child has been receiving special education in a public school, the parents would be obligated, before removing the child from public school and seeking private school tuition reimbursement, to give the school district ten days written notice, and their tuition claim could be reduced or denied if they acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). If the student had never set foot in a public school placement, however, the parents would have no obligation to give notice to the school district and their tuition claim would not be subject to reduction or denial based upon their unreasonable actions.

5. Congress has continued to amend the IDEA to provide still more mechanisms for collaboration between the public school and the parent, including making provisions for reconvening the IEP team and liberal post-placement amendments to an IEP (20 U.S.C. § 1414(d)(3) and (4)(B) and (e)), and resolution sessions and mediation (20 U.S.C. § 1415). *See Schaefer v. Weast*, 546 U.S. 49, 53-54 (2005).

POINT III

BURLINGTON DID NOT ESTABLISH THAT TUITION REIMBURSEMENT IS AVAILABLE WHERE A STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES FROM THE PUBLIC AGENCY

The plain meaning of the statute is also consistent with this Court's decision in *Burlington*. In an attempt to avoid the fact that their interpretation of subsection (C)(ii) would render it meaningless, respondent and the Solicitor General argue that the subsection merely codifies *Burlington*. *See, e.g.*, Brief for Respondent at p. 19. The Solicitor General goes so far as to argue that the subsection "is not superfluous because it addresses the most common situation in which reimbursement is sought" (Brief for the United States as Amicus Curiae Supporting Respondent at p. 7), and then makes the remarkable claim that adhering to the statute's plain language would work an implied repeal of a reimbursement remedy clearly established in the IDEA's predecessor statute by *Burlington*. *See* Brief for the United States as Amicus Curiae Supporting Respondent at p.17. These arguments fail, because *Burlington* did not address the situation presented in this case, in which the student has not previously received special education and related services under the authority of the public entity.

The student in *Burlington* had, prior to being removed from public school, received special education and related services pursuant to an IEP in a public school. *Burlington*, 471 U.S. at 361. After extensive and lengthy discussions which resulted in the school district proposing a new placement for the student, the student's parents rejected the proposed new IEP and enrolled him in a private school. *Id.* at 362. Thus, *Burlington*, on its facts, established the availability of a tuition reimbursement remedy where the student had been removed from a public school placement. It did not establish that such a remedy was

available where the student had not previously received special education and related services, because the Court had no occasion to consider that question.[6]

Respondent's and the Solicitor General's arguments are therefore implausible. It is implausible to argue that Congress, in enacting subsection (C)(ii), simply codified *Burlington* and did so specifically by using the "previously received" language, but meant for that language to be meaningless where a student has not previously received special education and related services from the public entity.

Similarly, the Solicitor General's implied repeal argument falls of its own weight. According to the Solicitor General, subsection (C)(ii) was meant to codify that tuition reimbursement is available where a student has previously received special education and related services from the public agency, the "most common situation in which reimbursement is sought." Yet the Solicitor General also claims incorrectly that *Burlington* stands for the proposition—beyond its facts—that tuition reimbursement is available where the student has not received special education or related services from the public agency. Thus, the Solicitor General contends that the plain language of the statute would work an implied repeal of the rule already established in the IDEA that tuition reimbursement is available in that situation. If the Solicitor General were right about *Burlington's* holding, however, it would mean that Congress, in enacting subsection (C)(ii), codified *Burlington's* facts but not its holding. This argument makes no sense.

In any event, since *Burlington* did not establish that tuition reimbursement is available where the student has not previously received special education and related services from the public

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6. In *Florence County Sch. Dist. Four et al. v. Carter*, 510 U.S. 7 (1993), the student also previously received special education and related services from the public entity, and thus the Court's decision did not address the question presented in the instant case.

entity, subsection (C)(ii) did not repeal—impliedly or otherwise—a remedy that was clearly established under the statute. Subsection (C)(ii) establishes that private school tuition is available in the factual situation presented by *Burlington*, and only in that factual situation.

If respondent and the Solicitor General are wrong about the purpose of subsection (C)(ii), as they are, only two conclusions may be drawn: (1) the language at issue here is meaningless; or (2) petitioner's interpretation of the statute is correct. Moreover, the notion that the statute, in piecemeal fashion, addresses a portion of the issue rather than the entire issue rests on an assumption that the statutory language is unclear and does not provide states with the notice required by Spending Clause legislation.

POINT IV

ALTHOUGH THE LEGISLATIVE RECORD REGARDING SUBSECTION (C)(ii) IS SPARSE, THAT RECORD SUPPORTS PETITIONER'S INTERPRETATION OF THE STATUTE

The legislative history, while not extensive, identifies problems that Congress intended to address in the 1997 amendments. Discussing those amendments, of which subsection (C)(ii) was a part, Representative Castle stated:

> This law ... has had unintended and costly consequences. For example, it has resulted in children being labeled as disabled when they were not. It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children ... This bill makes it harder for parents to unilaterally place a child in elite private schools at

> public taxpayer expense, lowering costs to local school districts.

143 Cong. Rec. H2498 (daily ed. May 13, 1997). In enacting subsection (C)(ii), Congress directly addressed the problems identified by Rep. Castle.

Subsection (C)(ii) prevents parents from trying to obtain tuition reimbursement when they have no intention that their child will attend public school. Parents who have no interest in cooperating with the public school remain free to send their children to private school, but they must do so at their own expense, and they may receive only those services outlined in 20 U.S.C. § 1412(a)(10)(A).

POINT V

THE DEPARTMENT OF EDUCATION'S COMMENTS REGARDING SUBSECTION (C)(ii) ARE NOT ENTITLED TO DEFERENCE

Because the language of the statute is clear, this Court need not refer to the Department of Education's comments regarding subsection (C)(ii).[7] Even if the statute's language were not clear, however, this Court should not defer to the DOE's commentary because it is devoid of analysis.

Respondent argues that the U.S. Department of Education ("DOE") has rejected the Board's interpretation of subsection (C)(ii). Brief for Respondent at p. 26. The Solicitor General also urges deference to the Department of Education's commentary in the event that this Court concludes that the statute is ambiguous on the question presented. Brief for the United States as Amicus Curiae Supporting Respondent at pp. 7-8. These arguments are unavailing.

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7. *See* 64 Fed. Reg. at 12,601-02; 71 Fed. Reg. at 46,599.

Pursuant to *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the initial question for the reviewing court is whether the statute is ambiguous. If, as here, the statute is not ambiguous, judicial inquiry ends. 467 U.S. at 843. If, on the other hand, a court determines that the statute is silent or ambiguous in relevant respects, then that court may accept the agency's interpretation if it is reasonable. *Id. See also United States v. Mead Corporation*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight accorded to an administrative judgment in a particular case will depend *inter alia* upon the thoroughness evident in its consideration and the validity of its reasoning).

The DOE's commentary contains no analysis of the "previously received" language, and ignores not only the plain language of the statute but the implementing regulation, implemented by the DOE itself, which specifically requires, *inter alia*, that the student must have previously received special education and related services from the public agency in order for the parent to be entitled to tuition reimbursement.[8] Moreover, the commentary makes the same mistake as do respondent and the Solicitor General; it assumes that *Burlington* and *Carter* answer a question they did not address. For these reasons alone, the DOE's commentary is unreasonable, and this Court should not defer to DOE's interpretation of the subsection.

Most important, however, if this Court finds the statutory language to be ambiguous, it should not defer to the Secretary's commentary because an ambiguous statute cannot provide the clear notice that Spending Clause legislation requires.

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8. 34 C.F.R. § 300.403. *See also* 64 *Federal Register* 12,406, Changes in Subpart D – Children in Private Schools, showing enumerated proposed changes.

POINT VI

THE STUDENT HAS NEVER RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF THE BOARD

Perhaps out of recognition that his interpretation of subsection (C)(ii) is untenable, respondent asserts that the student received special education and related services from the Board because an Individualized Education Plan was developed. Ignoring his rejection of the placement offered by the Board, respondent argues, without support from the statute or case law, that children who receive IEPs from their school district have received special education and related services from the public agency. Brief for Respondent at p. 31.

The IDEA provides definitions of both special education and related services, and an IEP is included nowhere in those definitions.[9] There is no legal basis, then, for equating the development of the IEP with the provision of special education and related services.

Furthermore, respondent's argument reflects a misunderstanding of the IDEA's provisions for evaluations and for development and implementation of the IEP. The school district must "obtain informed consent from the parent . . . before conducting an [initial] evaluation." 20 U.S.C. § 1414(a)(1)(D)(i)(I). Then, following the initial evaluation and development of the IEP, the school district must obtain further "informed consent from the parent . . . before providing special education and related services to the child." 20 U.S.C. § 1414(a)(1)(D)(i)(II). If the parent does not consent, the school district cannot implement the IEP. Indeed, it cannot even seek an order at an impartial hearing to permit it to provide special education and related services over the objection of the parent. 20 U.S.C. § 1414 (a)(1)(D)(ii)(II). Instead, where the parent "refuses to consent to the receipt of special education and related

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9. 20 U.S.C. §§ 1401 (26); 1401 (29).

services," the school district has no obligation to provide a free appropriate public education. 20 U.S.C. § 1414(a)(1)(D)(ii)(III).

Thus, the statute makes two things clear. First, it differentiates the initial evaluation from the provision of special education and related services—they are not the same thing.[10] Second, it makes clear that where a parent has not consented, the IEP cannot be implemented, and the child does not receive special education and related services. Respondent's argument that the IEP is the provision of special education and related services, then, is simply incorrect.

Respondent and the Solicitor General also argue that the student received special education and related services when the Board paid the student's tuition for the 1997-98 and 1998-99 school years at Gaynor pursuant to stipulations of settlement and discontinuance (Brief for Respondent at p.35; Brief for the United States as Amicus Curiae Supporting Respondent at p. 9).[11] That argument fails because, as this Court recently

10. Respondent asserts that the Act's definition of related services includes the "early identification and assessment of disabling conditions in children." Brief for Respondent at p. 33. Subsection (C)(ii) requires that a child "previously received special education and related services." Thus, even if respondent were correct that this definition incorporates an initial evaluation done for the purpose of developing the IEP, he must show that the student here received both special education and related services under the authority of the public agency. Respondent cannot make that showing, especially given that respondent rejected the recommended placement offered to the student.

11. The terms of the settlements are inadmissible pursuant to Fed R. Evid. 408, which provides that a settlement agreement may not be used to prove "liability for, invalidity of, or amount of a claim that was disputed as to validity or amount." *See, e.g., Arizona v. California*, 530 U.S. 392, 414 (2000); *United States v. International Bldg. Co.*, 345 U.S. 502, 505 (1953). This Court has acknowledged that settlements ordinarily occasion no issue preclusion unless it is clear that the parties intend their agreement to have such an effect, noting that "consent agreements ordinarily are intended to preclude any further litigation on

(Cont'd)

acknowledged, special education and related services are defined as services that are, *inter alia*, provided under public supervision and direction.[12] *Winkelman v. Parma City School District*, 127 S. Ct. 1994, 2000-2001 (2007). Respondent cannot demonstrate that the Board had a hand in supervising or directing the education provided by Gaynor to the student and, consequently, cannot demonstrate that the student previously received special education and related services under the authority of the Board.

POINT VII

STATES ARE NOT ON CLEAR NOTICE THAT § 1412(a)(10)(C)(ii) PERMITS TUITION REIMBURSEMENT WHEN THE STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF THE PUBLIC AGENCY

Respondent's attempts to avoid the plain meaning of subsection (C)(ii) run directly into a Spending Clause problem.[13] Respondent's argument boils down to the proposition that

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the claim presented but are not intended to preclude further litigation on any of the issues presented (citation omitted)." *Arizona v. California*, *supra*, 530 U.S. at 414. Moreover, respondent is precluded from relying upon the tuition reimbursements from the 1997 and 1998 school years in the instant appeal because the stipulations of settlement and discontinuance state that "[e]xcept with respect to the enforcement of any of the matters stated herein, or as provided in this paragraph, this Stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise (A10, A19)."

12. 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.121(a); 34 C.F.R. § 300.13.

13. This Court may consider petitioner's Spending Clause argument, having held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *See also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000).

although subsection (C)(ii) sets forth that hearing officers or courts may authorize tuition reimbursement when a student has previously received special education or related services from the school district, that subsection does not mean that they may not authorize tuition reimbursement where the student has not received special education and related services from the school district.

Respondent's interpretation is, to say the least, not an obvious interpretation of the statute's words. Subsection (C)(ii), on its face, sets forth a hearing officer's or court's authority to authorize private school tuition reimbursement. It says, *inter alia*, that a hearing officer or court may require the public agency to reimburse the parents of "a child with a disability, who previously received special education and related services under the authority of a public agency." A state official, reading this grant of authority, would hardly find it clear that the statute authorizes a hearing officer or court to order private school tuition reimbursement to parents of a child with a disability who did not previously receive special education and related services under the authority of the public agency. Accordingly, if respondent's interpretation is correct, the statute does not provide the clear notice required of Spending Clause legislation. *See Arlington Cent. Sch. Dist. Bd. Of Ed. v. Murphy*, 126 S. Ct. 2455 (2006).

Respondent claims that *Burlington* put school districts on notice that if they fail to provide FAPE, they are potentially liable for private school tuition reimbursement. Brief for Respondent at p. 14. However, in *Burlington* and *Carter, supra*, the students had in fact previously received special education and related services from the public entity. Therefore, those cases could not possibly put school districts on notice of an obligation to provide tuition reimbursement where a student has never received special education and related services from the public entity.

The simple fact is that respondent's interpretation would impose upon school districts the burden of paying private school tuition in circumstances where they otherwise would not. For that reason, respondents' reliance on this Court's decision in *Winkelman v. Parma City School District*, *supra*, is unavailing. In *Winkelman*, the Court noted that its "determination that IDEA grants independent, enforceable rights [to parents] does not impose any substantive condition or obligation on the States." 127 S. Ct. at 2006. In contrast, respondents' interpretation in this case would "result in a change to the States' statutory obligations" regarding when they must reimburse parents for private school tuition. *Id.* The result of respondent's interpretation will be significant expenditures of funds. Respondents' unsupported argument that his interpretation of the statute would impose no greater financial burden on school districts is wholly without merit.

Respondent's interpretation of subsection (C)(ii) impermissibly imposes a burden upon school districts to pay private school tuition where the student has never received special education and related services from the public agency. Since the statute does not clearly impose that obligation, the Court's Spending Clause jurisprudence prohibits it.

CONCLUSION

Petitioner respectfully requests that the judgment of the Second Circuit be reversed.

Respectfully submitted,

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